Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
VONAGE HOLDINGS CORPORATION	)	**WC-03-211**
	)	
Petition for Declaratory Ruling Concerning	)	
an Order of the Minnesota Public	)	
Utilities Commission	)	

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

On September 22, 2003, Vonage Holding Companies filed a *Petition for Declaratory ruling* urging the FCC to issue a declaratory ruling that it is not subject to any oversight by the Minnesota Public Utilities Commission ("MPUC"). That petition both misconstrues outstanding federal case law and FCC policy statements, and virtually ignores both State and federal statutory requirements.

In February 2003, the National Association of Regulatory Utility Commissioners ("NARUC") passed a resolution that notes "a significant portion of the nation's total voice traffic could be transported on IP networks within a few years" and urges the FCC to "confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services." The resolution also asked the FCC to have the Section 706 Joint Conference ". . .systematically address issues relating to Voice Over the Internet Protocol and to explore, with the States and the appropriate joint boards, and with industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service."

Subsequently, at our last meeting, the association passed another resolution on "information services" that provides additional details that the FCC should consider in making service classifications including the (1) uncertainty and reduced capital investment while the scope of the FCC's authority under Title I is tested in the courts; (2) the loss of consumer protections applicable to telecommunications services under Title II; (3) the disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty; (4) the increased risk to public safety; (4) the loss of state and local authority over emergency dialing services; and (5) the potential for a reduced support base for federal and State universal service as well as State and local fees and taxes.

The Vonage petition falls squarely within the bounds of both resolutions. Both are attached as Appendices to this pleading.

With respect to "phone-to-phone" IP Telephony, the FCC already indicated in a report to Congress that phone-to-phone IP Telephony constitutes provision of *telecommunications* over the public switched telephone network.[1] NARUC's November 2003 resolution points out that "…the principle of technological neutrality, regulatory jurisdiction should be based, whenever possible, on the characteristics of a service, not on the technology used to provide that service, whether the service is commingled with any other service or the speed or capacity of that service." Based upon that principle alone, there should be little controversy there over the correct classification of Vonage's service. From the end-user's perspective, such calls are indistinguishable from regular circuit switched toll calls. Indeed, in the earlier cited report, the FCC stated that the classification of a service under the 1996 Act depends on the functional

[1] *In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96- 45, Report to Congress, 12 FCC Rcd 11501 (1988) ("Steven's Report")*

nature of the end-user offering. In analyzing phone-to-phone IP telephony, the agency observed that " . . .[f]rom a functional standpoint, users of these services obtain only voice transmission, rather than information services . . ." The FCC accordingly tentatively concluded that phone-to-phone IP telephony constitutes a *telecommunications service* and those offering such service were *telecommunications carriers* within the meaning of Sections 153(46) & (44). Having classified phone-to-phone telephony service, the FCC went on to state that the Act and federal rules impose various requirements on such carriers, including contributing to universal service, paying interstate access charges, and providing disabled access. But in any case, there is nothing in the Act that evidences any intent that a basic telephony service loses its status as a *telecommunications service* subject to the requirements of the Act and FCC rules simply because it utilizes new technologies or networks, including the Internet, in offering *telecommunications services*. A *telecommunications service* is a *telecommunications service* regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.[2]

An examination of the specific claims in Vonage's petition for declaratory judgment demonstrates it is deficient in that it 1) violates the principle of technological neutrality which requires that regulatory status be based on the characteristics of the service, not on the technology used to provide the service,[3] 2) is based on speculative and unsupported claims with

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[2] *Steven's Report at ¶ 95 ("Congress did not limit the regulation of telecommunications service to circuit-switched wireline transmission.")*

[3] The FCC has recognized that the "*classification of a service . . . depends on the functional nature of the end-user offering,*" *Stevens Report* at ¶ 86, and that: "[T]o promote equity and efficiency, *we should avoid creating regulatory distinctions based purely on technology*. Congress did not limit "telecommunications" to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users." *Id.* at ¶ 98. (*Emphasis added.)* The *Report* also recognized that services provided by different technologies are functionally substitutable: "An end user that shifts its local exchange service from an [ILEC] to a [CLEC], or to a wireless carrier, is purchasing a *functionally identical service* using different providers or technologies. (*Emphasis added*.) *Id*. at ¶ 99." Similarly, the *Report* notes: "[U]sers of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers." *Id*. at ¶ 101.

respect to the impact of the MPUC's oversight,[4] 3) raises specious preemption claims,[5] and 4) fails to adequately explain why Vonage's service does not met the non-binding guideline for what constitutes a "telecommunications service" outlined in the 1998 Stevens report. Alternatively, should the FCC find the tentative conclusions in its 1998 policy statement unpersuasive, then Vonage's petition is at best premature, as the FCC has not yet made a definitive ruling on the status of such services. The Commission should formulate policy in this area only after a formal rulemaking.

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[4] Vonage's contentions concerning the difficulty of complying with MPUC rules conflict with the available empirical evidence. CLECs serve at least 17% of the access lines in the State, well above the national average of 13%. See, e.g., Tables 6 & 12 of "Local Telephone Competition: Status as of December 31, 2002" Industry Analysis and Technology Division Wireline Competition Bureau, FCC June 2003. There is no basis for believing the PUC will be less accommodating with Vonage than the other 165 certificated CLECs. Vonage's arguments demonstrate the deficits of its knowledge of the MPUC's regulatory regime. It claims…. "any practical effort to comply with Minnesota's regulatory system … undoubtedly would require blocking of at least some interstate traffic" (Petition at p. v); "because Vonage cannot comply with Minnesota 911 requirements, Vonage cannot satisfy the Minnesota PUC Order and will be forced to discontinue "intrastate" service in Minnesota" and/or "the Minnesota PUC cannot enforce its Order with respect to Vonage's intrastate services without also interfering with Vonage's ability to provide at least some jurisdictionally interstate services" (*Id.* at p. 29). The focus of these arguments is that Vonage will not be allowed to use ILEC facilities to route 911 calls (*Id.* at p. 9) and/or on the implicit premise that the Minnesota PUC will inflexibly apply the Minnesota 911 requirements so as to prevent it from obtaining certification. (*Id.* at p. 25). Both contentions are undermined by the facts. Minn. Rule 7812.0550, Subp. 2 says: " A LEC shall provide a CLEC with the access to facilities and information necessary to enable the CLEC to meet its 911 service obligations." If Vonage becomes certified, the Minnesota regulations themselves provide an avenue for resolution of this problem Vonage predicts the MPUC will apply the Minnesota 911 rules inflexibly, precluding Vonage from obtaining approval of a 911 plan. However, again, that's not what the Minnesota regulation indicate. Minn. Rule 7812.0550, subp. 3 lists criteria to be considered in review of a 911 plan and provides that the Minnesota PUC "shall consider, at a minimum, the [CLEC's] ability and intent … ." Minn. Rule 7812.0550, subp. 4 confirms that the Rules are not to be rigidly applied stating: " Use of decision criteria. The factors identified in subpart 3, items A to K, must be considered as criteria to assist the commission in its evaluation of the adequacy of 911 plans. No one factor may be considered dispositive." There is no credible basis to conclude that compliance with Minnesota PUC requirements will require Vonage to cease business operations in Minnesota or to block any calls, much less interstate calls.

[5] Vonage asserts three grounds for preempting the MPUC: 1) there is a direct conflict between federal and state law; 2) compliance with both federal and State law is physically impossible; and 3) State law is an obstacle to accomplishment of Congress objectives. The petition fails on all three counts. None of these conditions is present. There is no provision of federal law that is in outright or actual conflict with State regulation of the portion of Vonage service that is telecommunications. Further, in its recent ruling, the 9th Circuit has made it clear that an entity can be a provider of both Title II telecommunications service and services subject to other Titles of the Act. Congress has had no difficulty providing clear direction when there is a outright or actual conflict between State and federal law. The absence of similar clarity in regards to telecommunications service provided over the Internet indicates that there is no such conflict. For example, Section 253 expressly provides the circumstances under which State law must yield to federal law and policy for the promotion of competition. However, even is that case, States may make regulations for public safety so long as those regulations are applied in a competitively neutral manner. Vonage's petition would deny the States the opportunity to impose similar obligations on VoIP providers even though there is no comparable express authority for federal preemption in regards to VoIP services.

For the reasons discussed below, NARUC respectfully requests that the FCC reject this petition insofar as it requires a finding that Vonage's service is not a "telecommunications service" and engage the 706 Joint Conference to address these, and the related intercarrier compensation issues.

Respectfully submitted,

/S/

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Appendix A - Resolution Relating To Voice Over The Internet Telecommunications

WHEREAS, The Internet is providing opportunities for new methods to originate, transport, and terminate telecommunications, but is also providing new regulatory challenges, and

WHEREAS, AT&T Corp has filed a petition with the Federal Communications Commission requesting in part that the FCC prevent local exchange carriers from assessing interstate access charges on certain phone-to-phone Voice Over Internet Protocol services, pending adoption of final federal rules, and

WHEREAS, In 1998 the FCC reached a tentative conclusion that certain phone-to-phone IP calls may be telecommunications services, even if the carrier converts such a call to IP format and back again, and that a user who receives only voice transmission without other enhancements is receiving a telecommunications service, not an information service, and

WHEREAS, A decision by the FCC, in this docket or elsewhere, to declare all phone-to-phone calls over IP networks to be information services by virtue of the technology could have negative effects on various telecommunications policies, including universal service, and might be inconsistent with the 1996 Act, and

WHEREAS, Voice over the Internet Protocol and intercarrier compensation issues are inextricably linked, and

WHEREAS, A significant portion of the nation's total voice traffic could be transported on IP networks within a few years, now therefore be it

RESOLVED, By the Board of Directors of the National Association of Regulatory Utility Commissioners, convened in its February, 2003 Winter Meeting in Washington, D.C., that the FCC should confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services, and be it further

RESOLVED, That NARUC asks the 706 Joint Conference to systematically address issues relating to Voice Over the Internet Protocol and to explore, with the States and the appropriate joint boards, and with industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service, and be it further

RESOLVED, That NARUC's General Counsel should file with the FCC comments and ex parte presentations consistent with this resolution.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors February 26, 2003

Resolution on Information Services

WHEREAS, Communications consumers are served by an increasing number of technologies in today's markets and these technologies will continue to evolve and develop in the future; *and*

WHEREAS, The existing legal and regulatory constructs evolved in markets where almost all consumers were served by the public switched network and that new constructs will need to evolve and develop; *and*

WHEREAS, These FCC decisions and proceedings have or may assert jurisdiction under Title I over new technologies but without acknowledging that those technologies utilize and include telecommunications services; *and*

WHEREAS, When it passed the Telecommunications Act of 1996, Congress established a definition of "information services" and validated the FCC's previous rulings that enhanced services should be regulated on a different basis than telecommunications services; but Congress did not state that services that combine elements of information services and elements of telecommunications services should be regulated under Title I; *and*

WHEREAS, In 1998 the FCC reported to Congress that carrier regulation should be applied solely to companies that provide underlying transport, and not to the "information services" that are "built on top" of those facilities, and it tentatively concluded that certain phone-to-phone VOIP calls "bear the characteristics" of telecommunications services; *and*

WHEREAS, The Telecommunications Act of 1996 preserves the jurisdiction of the States to regulate intrastate telecommunications services; *and*

WHEREAS, Telecommunications Services associated with information services may be unregulated or more lightly regulated under the FCC's statutory forbearance powers [47 U.S.C. § 160]; *and*

WHEREAS, In February, 2003, NARUC adopted a resolution regarding VOIP services advising the FCC that a decision declaring all phone-to-phone calls to be information services by virtue of Internet technology might be inconsistent with the 1996 Act and could have negative effects on various telecommunications policies, including universal service, *now therefore be it*

RESOLVED, That the National Association of Regulator Utility Commissioners (NARUC), convened in its November 2003 Annual Convention in Atlanta, Georgia, that, in accordance with the principle of technological neutrality, regulatory jurisdiction should be based, whenever possible, on the characteristics of a service, not on the technology used to provide that service, whether the service is commingled with any other service or the speed or capacity of that service; *and be it further*

RESOLVED, That NARUC urges the FCC to carefully consider the following:

- Uncertainty and reduced capital investment while the scope of the FCC's authority under Title I is tested in the courts;
- Loss of consumer protections applicable to telecommunications services under Title II;
- Disruption of traditional balance between federal and State jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty;
- Increases risk to public safety;
- Customer loss of control over content;
- Loss of state and local authority over emergency dialing services; and
- Reduced support base for federal and State universal service as well as State and local fees and taxes, *and be it further*

RESOLVED, That State and federal regulators should work together to adapt their regulatory oversight to the technological changes in communications markets so that all consumers receive the benefits of these new technologies; *and be it further*

RESOLVED, that NARUC General Counsel is authorized to make filings consistent with this resolution, including filing *amicus curiae* briefs in court proceedings.

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Sponsored by the Committee on Telecommunications
Recommended by the NARUC Board of Directors, November 18, 2003
Adopted by NARUC Convention, November 19, 2003